No. 23-CV-607

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOHN T. MCFARLAND,
APPELLANT,

V.

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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STATEMENT OF THE ISSUES

If a District employee believes that their actual job responsibilities do not match their classification or grade, they may request a review by the District of Columbia Department of Human Resources ("DCHR") seeking reclassification. As originally enacted, the statute providing this review allowed for an administrative appeal to the Office of Employee Appeals ("OEA") and then judicial review by the Superior Court. In 1998, the Council removed classification appeals and other minor grievances from the OEA's jurisdiction, leaving no avenue for judicial review. Appellant John T. McFarland challenges a DCHR decision upholding its prior determination that his job was properly classified at his current grade. The questions presented are:

1. Whether the Superior Court had jurisdiction to hear this classification appeal given that the Council removed judicial review over classification appeals that do not result in a reduction in grade.

2. Alternatively, whether substantial evidence supports DCHR's decision, which was adequately explained and consistent with governing law and prior decisions that rejected McFarland's previous challenge to his job classification.

STATEMENT OF THE CASE

McFarland filed a petition for review in the Superior Court on November 16, 2017 seeking to reopen DCHR's July 2014 decision concluding that he was properly

classified in his position, which the Superior Court and this Court had already upheld on appeal. *See* Order, *McFarland v. D.C. Dep't of Hum. Res.*, No. 2017 CA 007722 (D.C. Super. Ct. Sept. 17, 2019) (Add. 13a). On September 17, 2019, the Superior Court remanded the case back to DCHR for further review in light of additional evidence not included in the earlier administrative record. Add. 12a-16a. On remand, DCHR again concluded that McFarland was properly classified. JA 15-20.

McFarland filed the instant petition for review in the Superior Court on December 18, 2019, naming DCHR and his employing agency, the Department of Consumer and Regulatory Affairs ("DCRA"),[1] as respondents. JA 10. On June 22, 2023, the Superior Court denied the petition and affirmed DCHR's classification decision. JA 69-72. McFarland timely filed a notice of appeal on July 20. JA 73.

STATEMENT OF FACTS

1. Statutory and Regulatory Background.

The District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Law 2-139, 25 D.C. Reg. 5740, codified at D.C. Code § 1-601.01 *et seq.*, is the "comprehensive system of public personnel administration in the

[1] Pursuant to the Department of Buildings Establishment Act of 2020, D.C. Law 23-269, 68 D.C. Reg. 4174 (2021), the responsibilities of DCRA were transferred to the Department of Buildings and the Department of Licensing and Consumer Protection in October 2022. The caption should be amended to reflect McFarland's current employment with the Department of Buildings. *See* D.C. App. R. 43(c).

District of Columbia government." *Council of Sch. Officers v. Vaughn*, 553 A.2d 1222, 1225 (D.C. 1989). The Council enacted the CMPA in response to perceived shortcomings of the District's preexisting personnel system, which "awkwardly meshed the District personnel apparatus with the federal personnel system." *District of Columbia v. Thompson*, 593 A.2d 621, 632 (D.C. 1991) (cleaned up). The goal was to replace that "inefficient" and "often counter productive" system with a "truly uniform" and comprehensive merit personnel structure. *Id.* (cleaned up).

The District uses the federal classification system developed by the U.S. Office of Personnel Management ("OPM") for its positions. *See* D.C. Code § 1-611.01(c); 6B DCMR § 1102.1. That system divides personnel positions into occupational groups, which are further divided into occupational series and grades. *See* OPM, *Introduction to the Position Classification Standards* 3-4 (rev. Aug. 2009), https://tinyurl.com/2k6uweep. Most District employees are part of the Career Service, meaning their series and grade designation will begin with "CS." *Types of Appointments*, DCHR, https://dchr.dc.gov/page/types-appointments (last visited May 31, 2024).

The CMPA and its implementing regulations also establish procedures for resolving classification disputes. D.C. Code § 1-616.53; 6B DCMR § 1110. If an agency believes a position may require reclassification, it can ask DCHR to conduct a position review. *Classification Position Reviews and Desk Audits: Issuance No.*

I-2021-20, DCHR (June 17, 2021), https://tinyurl.com/vykxptdx. Likewise, if a District employee believes there is a significant discrepancy between the position's official description and the employee's actual duties and responsibilities, the employee may request a DCHR desk audit. *Id.* The process for both reviews is the same: a DCHR classification specialist will interview the relevant employees and supervisors to determine if the position requires reclassification based on the position's duties and responsibilities. *Id.* After the review is complete, DCHR will issue a position classification review decision, which the employee can then appeal to the Director of DCHR. *Id.*; 6B DCMR § 1110.2. The Director will review the appeal and make a final determination. 6B DCMR § 1110.4.

As originally enacted, the CMPA provided that an employee could "appeal a final agency decision . . . deciding the classification of a position" to the OEA. D.C. Law 2-139, § 603(a) (originally codified at D.C. Code § 1-606.03(a)); *see also id.* § 1102(c) (originally codified at D.C. Code § 1-611.02(c)) ("The Mayor shall provide that employees whose positions are covered in this classification system have the right to appeal the classification of their positions without restraint or fear of reprisal or prejudice as provided in title VI of this act to the Office of Employee Appeals."). An adverse decision by the OEA could then be appealed to the Superior Court. *Id.* § 603(d) (originally codified at D.C. Code § 1-606.03(d)). A final

judgment by the Superior Court could then be appealed to this Court under D.C. Code § 11-721(a)(1).

In 1998, the Council eliminated that appeal structure by enacting the Omnibus Personnel Reform Amendment Act of 1998 ("Omnibus Act"), D.C. Law 12-124, 45 D.C. Reg. 2464. The Omnibus Act removed classification decisions from the list of proceedings that could be appealed to the OEA and subsequently to the Superior Court. D.C. Law 12-124, § 101(d)(1) (amending D.C. Code § 1-606.3(a)). It also repealed CMPA § 1102(c), which had guaranteed employees the right to appeal classification decisions to the OEA without fear of reprisal. D.C. Law 12-124, § 101(n)(1). Under the current CMPA, the only decisions that may be appealed to the OEA are "a removal, a reduction in grade, or suspension of 10 days or more." D.C. Code § 1-616.52(b).

The Council also amended the CMPA's definition of "grievance" to explicitly exclude "classification matters." D.C. Law 12-124, § 101(a)(1) (amending D.C. Code § 1-603.01(10)). A "grievance" generally includes any minor personnel matter (with certain exceptions, like classification), which can be administratively reviewed up the employee's chain of command and ultimately to DCHR or the City Administrator. *See* 6B DCMR §§ 1626-1633. Prior to the Omnibus Act, an employee could seek OEA review of any grievance, but that is no longer the case. *Coleman v. District of Columbia*, 80 A.3d 1028, 1032 n.5 (D.C. 2013). Under the

current law, if an employee completes all four levels of grievance review and receives a final determination, that decision is "final and not subject to any further grievance or appeal before any administrative body or court." 6B DCMR § 1633.4.

The Council's stated goal in making these changes was to eliminate employees' ability to appeal classification decisions (other than those that result in a reduction in grade) beyond the Director of DCHR. In the bill's committee report, the Council stated that "[e]mployees will no longer have a venue for contesting classification matters" other than a negotiated grievance and arbitration procedure, if one is available under an applicable collective bargaining agreement. D.C. Council, Report on Bill 12-44, at 15 (Jan. 6, 1997).

Over time, DCHR updated its regulations to reflect these changes to classification appeals. In early 2000, DCHR adopted a rule to reflect that classification decisions could no longer be appealed to the OEA. *See* DCHR, Notice of Final Rulemaking, 47 D.C. Reg. 2421 (Apr. 7, 2000) (amending 6B DCMR § 1110). However, that rule retained language indicating that a final classification decision by DCHR was appealable directly to the Superior Court. *Id.* at 2422 (codified at 6B DCMR § 1110.6). In 2022, DCHR again updated its regulations, including Section 1110 governing classification decisions. *See* DCHR, Notice of Final Rulemaking, 69 D.C. Reg. 10,387 (Aug. 12, 2022). Under the current regulations, "[e]xcept when a classification decision results in a reduction in grade,

the Director's decision on a classification appeal shall be final and not subject to further administrative or judicial review." 6B DCMR § 1110.5. This change was made, DCHR explained, to bring the regulation into conformity with the Omnibus Act, "which removed classification appeals from OEA's jurisdiction." 69 D.C. Reg. at 10,388. After the Omnibus Act's amendments, "the CMPA no longer authorizes employees to appeal classification decisions to the Superior Court." *Id.* Accordingly, the regulatory change reflects that classification decisions by the Director of DCHR are "final" and "without specific authorization for judicial review." *Id.*

2. Procedural History.

McFarland was employed as a Program Support Specialist with the Department of Consumer and Regulatory Affairs ("DCRA") from 2008 until 2022, when he was transferred to the newly created Department of Buildings. A Program Support Specialist is classified as part of the Miscellaneous Administration and Program Series and is designated as CS-0301. JA 30; *see* OPM, *Position Classification Flysheet for Miscellaneous Administration and Program Series, GS-0301* (Jan. 1979), https://tinyurl.com/bdzz5mhk. In 2011, McFarland sought a desk audit from DCHR because he believed his position should be classified as Grade 11 rather than his current Grade 9. JA 30. DCHR initially assigned a human resources specialist, Peter Delate, to conduct the desk audit but reassigned the case to another

human resources specialist, Lewis Norman, after Delate's departure from DCHR. JA 30. Completion of the audit was delayed because McFarland failed to attend scheduled meetings with DCHR to discuss his position and because he was detailed away from his position for two years. JA 30.

Norman completed the desk audit on October 28, 2013. JA 29-33. The desk audit evaluated McFarland's position using the Administrative Analysis Grade Evaluation Guide developed by OPM, which places positions in grades by assigning point values to nine Factor Evaluation System ("FES") factors: knowledge required by the position, supervisory controls, guidelines, complexity, scope and effect, personal contacts, purpose of contacts, physical demands, and work environment. JA 31-33. Applying that framework, the desk audit assigned McFarland's position 1,990 points, which converted to a Grade 9. JA 33. The results of the desk audit were memorialized in a position classification review decision. JA 29-33.

In June 2014, McFarland appealed the classification review decision to the DCHR Director, who affirmed that McFarland's position was properly classified as Grade 9 on July 16, 2014. JA 34-43. The classification appeal decision again carefully reviewed each of the nine FES factors; assigned points to each based on McFarland's duties, responsibilities, and qualifications; and affirmed that Grade 9 was the appropriate classification. For example, on the supervisory controls factor, the June 2014 decision explained that McFarland's position met the requirements of

Level 2-3 (275 points) because his work involved being assigned specific projects with general supervision, but that it did not meet Level 2-4, which involves the joint development of project plans by the employee and supervisor with supervisory review of the employee's work only upon the project's completion. JA 38-39. McFarland petitioned for review, and the Superior Court and this Court upheld DCHR's decision maintaining the Grade 9 classification. *See* Judgment, *McFarland v. D.C. Dep't of Hum. Res.*, No. 16-CV-399 (D.C. Feb. 16, 2017) (Add. 1a-2a) (concluding that DCHR's decision was supported by substantial evidence).

In August 2017, McFarland asked DCHR to reverse the October 2013 position classification review decision and the DCHR Director's July 2014 classification appeal decision, which the Superior Court and this Court had already upheld. JA 15. DCHR reviewed the request and informed McFarland on October 16, 2017, that it did not have sufficient reason to reconsider either decision. JA 15.

In November 2017, McFarland filed another petition for review in the Superior Court. Add. 13a. In connection with that petition, he produced two documents obtained through a Freedom of Information Act request: (1) a March 30, 2011 memo from Delate relating to his desk audit, JA 21-22, and (2) a document titled "classification appeal decision," also authored by Delate, dated May 3, 2011, JA 23-28. Those materials expressed the view that McFarland was performing the duties of a Grade 11 Program Support Specialist based on his level of independence

in the role. JA 22, 28. However, Delate's memo indicated that McFarland was experiencing "performance issues," namely, that he was not properly "keeping management informed." JA 22, 25. In Delate's view, this suggested that McFarland was "operating independently, but not well." JA 22. Delate recommended either more closely supervising McFarland's work in accordance with Grade 9's level of responsibility or placing him on "an action plan to improve his performance" at Grade 11. JA 22. Neither of the 2011 documents evaluated McFarland's position by assigning points under the FES factors.

Based on DCHR's review of its records, it appeared that these two Delate documents were predecisional drafts that were not finalized before Delate's departure from DCHR and that were not adopted by the agency as a final decision. *See* Decl. of Lorraine Green, *McFarland v. D.C. Dep't of Hum. Res.*, No. 2017 CA 007722 (D.C. Super. Ct. Dec. 21, 2018) (Add. 3a-8a). For instance, Delate informed McFarland via email on April 11, 2011 that he had completed his desk audit but that his supervisor had requested changes to his draft classification review decision and would need to review it before it was finalized. Ex. 3 to Decl. of Lorraine Green, *McFarland v. D.C. Dep't of Hum. Res.*, No. 2017 CA 007722 (D.C. Super. Ct. Dec. 21, 2018) (Add. 9a-11a). The March 30, 2011 memo is not styled as a classification review decision, which is the normal outcome of a desk audit. And the May 3, 2011 document titled "classification appeal decision" also appears to be a draft. It was

signed only by Delate, who signed it twice using different titles. JA 28. DCHR policy would have required a supervisor to sign a classification appeal decision; it would not have permitted Delate to "'approve' his own report." Add. 7a. Moreover, McFarland had not yet received—much less appealed—the results of his desk audit, so DCHR could not have issued a classification appeal decision at that time.

The Superior Court vacated DCHR's October 2017 decision and remanded for further consideration. Add. 12a-16a. It concluded that Delate's materials had been erroneously omitted from the record when DCHR had conducted its review in October 2017. Add. 15a-16a. It instructed DCHR to reconsider its October 2017 decision in light of the additional materials. Add. 16a.

On remand, DCHR assigned a new team member who had no prior involvement in McFarland's case to review the relevant materials and determine whether they comported with established classification standards. JA 15-16. That review was completed in November 2019. It concluded that the two documents authored by Delate in 2011 had not followed established standards because they had not used any grading criteria and had merely compared the Grade 9 position description with the Grade 11 description. JA 19-20. The desk audit conducted in 2013 and the classification appeal decision in 2014, by contrast, had used the Administrative Analysis Grade Evaluation Guide developed by OPM to assign points across nine FES categories. JA 20. Based on this independent analysis,

DCHR determined that the 2014 classification appeal decision concluding that McFarland's position was properly classified as Grade 9 was correct. JA 16.

McFarland again petitioned for review. JA 10-14. He argued that DCHR should not have considered the classification appeal decision from 2014 as part of its November 2019 decision. JA 53-54. He also briefly argued that the District should be sanctioned for making unspecified false statements during the prior litigation allegedly indicating that Delate had not completed his desk audit prior to his departure from DCHR. JA 54-55. McFarland did not cite any legal authority in support of his sanctions request, nor did he request any specific sanction. JA 54-55.

On June 22, 2023, the Superior Court concluded that DCHR's November 2019 decision was supported by substantial evidence and denied the petition. JA 69-72. It concluded that DCHR properly reviewed all of the materials in the administrative record, including the 2011 materials prepared by Delate, and reasonably concluded that Delate's analysis had not followed established classification procedures. JA 71-72. The review conducted in 2013 and 2014 had properly used the FES factors to guide its analysis, and therefore DCHR's November 2019 decision was justified. JA 71-72. The court also denied McFarland's request for sanctions, noting that McFarland had "not request[ed] any specific sanctions" nor "cite[d] to any law which compels the [District] to be sanctioned." JA 72. This timely appeal followed. JA 73.

STANDARD OF REVIEW

This Court assesses questions of the trial court's subject-matter jurisdiction de novo. *RFB Properties, LLC v. Fed. Nat'l Mortg. Ass'n*, 284 A.3d 381, 385 (D.C. 2022). On the merits, this Court applies the same standard as the Superior Court; meaning it "must examine the administrative record to determine whether there has been procedural error, whether there is substantial evidence in the record to support the [agency's] findings, or whether the [agency's] action was in some manner arbitrary, capricious, or an abuse of discretion." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Finally, the Court reviews the Superior Court's decision to impose (or not impose) sanctions for abuse of discretion. *Gray v. Washington*, 612 A.2d 839, 842 (D.C. 1992).

SUMMARY OF ARGUMENT

1. This Court should vacate and remand with instructions to dismiss for lack of jurisdiction. Although there is a "strong presumption" that agency actions are subject to judicial review, that presumption is rebutted if it is "fairly discernible" from the statutory scheme that the legislature did not intend for a particular type of agency decision to be examined by the courts. Both the CMPA and its federal counterpart have been recognized to abrogate judicial review of certain agency personnel actions because each statute was designed to create a comprehensive and exclusive system for addressing personnel matters affecting government employees.

The Omnibus Act amended the CMPA to remove classification decisions from the list of actions that may be administratively reviewed by the OEA or judicially reviewed by the courts. The legislative history of these changes reflects a deliberate effort to remove classification appeals (and other minor personnel matters) from the OEA's purview because the Council thought such review was burdensome and unnecessary. The Council took this action in full acknowledgment that employees would "no longer have a venue for contesting classification matters" unless one was negotiated by a union.

This change accords with the CMPA's broader goal of streamlining the review of District employee personnel matters. In prior cases, both this Court and the Supreme Court have recognized that the adoption of a comprehensive personnel system that expressly provides for judicial review of some actions but not others is a strong indication that the legislature intended the remedies specified to be exclusive. Here, where the Council expressly *deleted* a preexisting path to judicial review for classification matters, the evidence that no judicial review is available could hardly be stronger.

Finally, to the extent that there is any ambiguity, the Court should defer to DCHR's regulations reasonably interpreting the CMPA and the Omnibus Act. DCHR carefully reviewed the statutes and their history in concluding that the

Council did not want judicial review of classification matters, and that interpretation is entitled to deference under this Court's precedents.

2. Alternatively, if the Court concludes that it has jurisdiction, it should affirm on the merits because DCHR's November 2019 ruling was supported by substantial evidence and was neither arbitrary, capricious, nor an abuse of discretion. The November 2019 review examined afresh both (1) DCHR's 2013-2014 decision (which this Court already concluded was supported by substantial evidence) and (2) the materials prepared by Delate in 2011. DCHR reasonably found that the 2013-2014 review applied the proper methodology for calculating a grade level as instructed by OPM, but that the 2011 materials did not. There was no abuse of discretion in declining to overturn a decision that had already been affirmed by this Court as supported by substantial evidence based on materials that were apparently never finalized and that used incorrect methods.

McFarland's arguments to the contrary are unpersuasive. He implausibly contends that Delate's analysis from 2011 might have used the correct methodology, even though the materials themselves provide no evidence for that proposition. He also argues that DCHR should have ignored the analysis it conducted in 2013 and 2014, even though it was expressly ordered by the Superior Court to re-review its decision in light of the *full* record. And finally, McFarland briefly argues that the Superior Court should have imposed unspecified sanctions for unspecified false

statements made during the earlier appeal of the 2013-2014 review. But McFarland's request for sanctions was perfunctory, unsupported, and procedurally improper, and he identifies no abuse of discretion by the Superior Court.

ARGUMENT

I. The Omnibus Act Precludes Judicial Review Of Classification Appeals That Do Not Reduce An Employee's Grade.

The question of whether McFarland's claim is judicially reviewable under the CMPA goes to the Superior Court's subject-matter jurisdiction. *Coleman*, 80 A.3d at 1030 n.2. This Court has an "independent obligation" to confirm the existence of subject-matter jurisdiction before reaching the merits. *D.C. Dep't of Corr. v. D.C. Dep't of Emp. Servs.*, 308 A.3d 699, 702 (D.C. 2023). Although the issue of jurisdiction was not addressed below, parties cannot waive subject-matter jurisdiction or confer it upon the Superior Court, and the absence of jurisdiction can be raised at any time, even on appeal. *District of Columbia v. AFGE, Loc. 1403*, 19 A.3d 764, 771 (D.C. 2011). If the Superior Court lacked jurisdiction to hear this case, the Court must vacate the judgment and remand with instructions to dismiss the petition for review for want of jurisdiction. *King v. Kidd*, 640 A.2d 656, 662 (D.C. 1993).

To be sure, there is a "strong presumption" that actions of District agencies are subject to judicial review. *D.C. Hous. Auth. v. D.C. Off. of Hum. Rts.*, 881 A.2d 600, 608 (D.C. 2005); *see District of Columbia v. Sierra Club*, 670 A.2d 354, 358

(D.C. 1996). In many circumstances, the legislature has specified how that review should occur. For example, to challenge an agency action that qualifies as a "contested case," an individual ordinarily must seek review in this Court. D.C. Code § 2-510. Where the Council has not explicitly provided an avenue for review, there is a presumption that an individual aggrieved by an action of the District government may seek redress through an equitable action in Superior Court, *Coleman*, 80 A.3d at 1031, since the Superior Court is "a court of general jurisdiction with the power to adjudicate any civil action at law or in equity involving local law," *Powell v. Wash. Land Co.*, 684 A.2d 769, 770 (D.C. 1996); *see* D.C. Code § 11-921.

But the presumption of judicial reviewability is not unyielding. When there is "clear and convincing evidence" that the legislature intended there to be no cause of action to review an agency's decision, courts should not infer one. *Sierra Club*, 670 A.2d at 358. The clear and convincing evidence standard should not be applied "in the strict evidentiary sense"; rather, the presumption favoring judicial review is overcome "whenever the [legislature's] intent to preclude judicial review is fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984) (cleaned up); *see Coleman*, 80 A.3d at 1031 n.3. Legislative intent to preclude judicial review can be determined "not only from [a statute's] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Coleman*,

80 A.3d at 1031 (quoting *Thompson*, 593 A.2d at 632). For instance, if a statute "commit[s] the challenged action entirely to agency discretion," then "there is no law to apply" in a given case. *Sierra Club*, 670 A.2d at 358. In other instances, legislative intent to preclude judicial review may be inferred from the adoption of a comprehensive system of administration that would be "frustrate[d]" by permitting direct judicial review. *Coleman*, 80 A.3d at 1034.

The CMPA is one statute where this Court has "often" recognized the Council's intent to foreclose particular judicial actions. *D.C. Metro. Police Dep't v. Fraternal Ord. of Police*, 997 A.2d 65, 77 (D.C. 2010) (collecting cases). "With few exceptions, the CMPA is the exclusive remedy for a District of Columbia public employee who has a work-related complaint of any kind." *Robinson v. District of Columbia*, 748 A.2d 409, 411 (D.C. 2000). This means that for most employment-related grievances, the CMPA's remedies preclude judicial review through other legal or equitable causes of action that would ordinarily be available. *D.C. Metro. Police Dep't*, 997 A.2d at 77; *see also, e.g.*, *AFGE, Loc. 1403*, 19 A.3d at 774 (holding that the CMPA foreclosed a labor union's action under the Uniform Arbitration Act to enforce an interest arbitration award); *White v. District of Columbia*, 852 A.2d 922, 923-27 (D.C. 2004) (concluding that the CMPA foreclosed an employee's fraudulent misrepresentation claim even if judicial remedies would be "more generous" than those available under the CMPA). Often the courts play

"a reviewing role" and act "as a last resort" once an employee has exhausted the CMPA's procedures. *Thompson*, 593 A.2d at 634. But sometimes the preclusive force of the CMPA means that a particular agency action is simply "not subject to judicial review" at all. *Coleman*, 80 A.3d at 1035.

The Omnibus Act's changes to the CMPA demonstrate that classification appeals that do not result in a reduction in grade are decisions for which no judicial review is available. The text, purpose, and legislative history of the Omnibus Act (and the CMPA more broadly) all demonstrate an intent by the Council to preclude judicial review for classification decisions like McFarland's. DCHR's updated regulations reflect a reasonable reading of the Omnibus Act and are entitled to deference.

A. The statutory text precludes judicial review of most classification decisions.

The original CMPA provided an explicit avenue for judicial review of classification decisions, and it said so in multiple provisions. *See supra* pp. 3-5. Employees dissatisfied with the results of a desk audit could appeal to the Director of DCHR, and that decision could be appealed to the OEA and then to the Superior Court. D.C. Law 2-139, §§ 603(a), (d), 1102(c) (formerly codified at D.C. Code §§ 1-606.03(a), (d), 1-611.02(c)). But the Omnibus Act deliberately erased all references to this path to judicial review. It deleted classification appeals from the list of decisions that are appealable to the OEA. D.C. Law 12-124, § 101(d)(1). It

repealed the statutory section guaranteeing employees the right to appeal all classification decisions to the OEA without fear of reprisal. *Id.* § 101(n)(1). And to ensure that classification appeals could also not be administratively appealed as a "grievance," it excluded classification decisions from the definition of that term, *id.* § 101(a)(1), and made grievances reviewable only up the chain of command rather than to the OEA. In other words, once a classification appeal is decided by the Director of DCHR, administrative and judicial review ends.

The Council could hardly have been clearer in making these changes. As explained in the accompanying committee report, the aim was to "restrict[] the type of cases employees can appeal to OEA" to "major actions," i.e., "suspensions of ten days or more, reductions in grade, and removals." Report on Bill 12-44, at 14. Cabining the OEA's review was necessary, the committee explained, because the OEA was "unable to handle appeals from minor adverse actions and grievances and the backlog of such cases [was] interfering with the agency's ability to decide appeals from more major actions in an expeditious manner." Report on Bill 12-44, at 14. And classification appeals to the OEA in particular were rare and "virtually always" unsuccessful. Report on Bill 12-44, at 16.

The effect on classification appeals is plain. Following the Omnibus Act's amendments, District employees are "no longer . . . able to appeal to OEA from a final agency decision concerning . . . classification decisions." Report on Bill 12-

44, at 15. That means that employees "*no longer have a venue for contesting classification matters* other than in a negotiated grievance and arbitration procedure . . . in a collective bargaining agreement between the District and a labor organization representing employees." Report on Bill 12-44, at 15 (emphasis added); *see also* Report on Bill 12-44, at 16 (explaining that the Omnibus Act "repeals the provision . . . of the CMPA which establishes the right of employees to appeal the classification of their positions to the OEA"). It is clear from these passages that the Council's goal was not only to stop classification appeals from reaching the OEA, but to eliminate *any* "venue" for contesting classification appeals—including judicial ones—unless negotiated by a union.

B. The Omnibus Act aligns with the CMPA's broader purposes.

The Omnibus Act's changes make sense in light of the Council's desire to streamline the District's process for handling employee grievances. Broadly speaking, the CMPA was designed to replace a "disjointed" and "decentralized" personnel system with one that was "modern" and "truly uniform." *Thompson*, 593 A.2d at 632-33; *see supra* pp. 2-3. One specific goal of the CMPA was to establish "impartial and comprehensive administrative or negotiated procedures for resolving employee grievances." D.C. Code § 1-601.02(a)(5). The changes made by the Omnibus Act were attempts by the Council to "balance . . . efficient and effective administration" with "the right of employees to be treated fairly and in a nonarbitrary

fashion." Report on Bill 12-44, at 14. On multiple occasions, this Court has "expressed concern that permitting parties to seek relief outside of the CMPA would frustrate the CMPA's aim to achieve order and efficiency." *Coleman*, 80 A.3d at 1033 (cleaned up).

In assessing whether the CMPA preempts other common-law or statutory claims, this Court has frequently looked to *United States v. Fausto*, 484 U.S. 439 (1988), in which the Supreme Court held that a former federal employee was precluded by the Civil Service Reform Act ("CSRA") from challenging an adverse personnel action. *See Coleman*, 80 A.3d at 1033; *D.C. Metro. Police Dep't*, 997 A.2d at 78; *Thompson*, 593 A.2d at 632. In *Fausto*, the affected employee sought backpay after he was suspended for misconduct. 484 U.S. at 441-43. Like the CMPA, the CSRA was designed to create a uniform personnel system and provided no explicit avenue for this type of employee to seek administrative or judicial review of his suspension; the question was whether he could "pursue the remedies that had been available before enactment of the CSRA." *Id.* at 444.

The *Fausto* Court concluded that he could not, for two reasons. *First*, the CSRA's comprehensive remedial structure explicitly afforded administrative and judicial review for adverse actions against other types of federal employees, but not the type of employee at issue in *Fausto*. *Id.* at 444-47. Congress's decision not to include certain classes of employees in provisions establishing administrative and

judicial review was, in the Court's view, strong evidence of "a congressional judgment that those employees should not be able to demand judicial review." *Id.* at 448. *Second*, the Court pointed to "the structure of the statutory scheme." *Id*. at 449. If the employee in *Fausto* was able to seek immediate judicial review of his suspension, that would afford him greater access to the courts than certain employees in preferred positions, who could not seek such review, and it would permit review in courts throughout the country rather than as part of the unified scheme contemplated by the CSRA. *Id.* at 449-51. These features made Congress's intention "fairly discernable" and rebutted the presumption of judicial review. *Id.* at 452.

This Court has applied the logic of *Fausto* to suits under the CMPA. In *Coleman*, the Court held that the CMPA did not allow an unsuccessful job applicant to sue a District agency for allegedly pre-selecting candidates. 80 A.3d at 1032-35. After the changes made by the Omnibus Act, such complaints cannot be appealed to the OEA through the grievance process, and therefore nothing in the CMPA explicitly provides for judicial review. *Id.* at 1032; *see also supra* pp. 5-6 (explaining Omnibus Act's changes to the grievance procedure). Allowing such a suit, the Court observed, would run contrary to the CMPA's goals in establishing a comprehensive and centralized government personnel system. *Coleman*, 80 A.3d at 1034. Moreover, it would be unusual considering that the CMPA "has detailed provisions

specifying the administrative and judicial review available under its statutory scheme" that "limit[] OEA review to more serious adverse actions, such as removal, reduction in force, reduction in grade, and suspension for ten days or more." *Id.* at 1034-35. In concluding that no judicial review was available, the Court emphasized "three features" of the case: that it involved a job applicant, not an employee; that the claim arose from the CMPA rather than another source of law; and that the violations alleged were "primarily" of regulations issued under the CMPA. *Id.* at 1035.

The logic of *Fausto* and *Coleman* applies equally here, for three reasons. *First*, allowing employees to seek judicial review of classification appeal decisions made by DCHR's Director would run counter to the Council's goals of streamlining and centralizing personnel administration. Permitting such suits would be in tension with the Council's choice to remove classification matters from the CMPA's provisions governing grievances and with the "detailed" provisions limiting administrative and judicial review to "more serious adverse actions." *Id.* at 1034; *see also* Report on Bill 12-44, at 15 (explaining the Council's intent to eliminate any "venue for contesting classification matters"). For instance, it would be strange for the Council to express concern about the burden that reviewing minor personnel grievances was imposing on the OEA—where it had created a "backlog" that was

delaying resolution of more serious cases—only to shift that burden to the Superior Court. Report on Bill 12-44, at 14.

Second, classification appeals allege that the position is misclassified under regulations adopted pursuant to the CMPA, not "a distinct substantive source of law." *Coleman*, 80 A.3d at 1035. To be clear, if an employee were to allege that their position was misclassified based on some other law—e.g., if an employee alleged their job duties had changed due to discrimination or retaliation in violation of the District's Human Rights Act—the same analysis would not apply. The only type of classification claim that the Omnibus Act withdrew from judicial review is one based purely on the CMPA itself, and one where the employee has not been adversely affected by a reduction in grade.

Third, classification appeals that do not result in a reduction in grade do not upset the employee's vested expectations. That makes them different than the claim at issue in *Nunnally v. D.C. Metropolitan Police Department*, 80 A.3d 1004 (D.C. 2013), where a lieutenant requested that she not be charged sick leave for work missed for a psychological injury. *Id.* at 1005-10. A specific provision of the CMPA, D.C. Code § 1-612.03(j), provided that such leave was non-chargeable for injuries incurred from the "performance of duty," and the question was whether injuries incurred from workplace harassment qualified. *See id.* at 1010-13. The question implicated an employee's entitlement to use earned sick leave as provided

in the statute, which is a constitutionally protected property interest. *District of Columbia v. Jones*, 442 A.2d 512, 517 (D.C. 1982). Classification appeals do not involve the same risk of unsettling employee expectations because an unsuccessful appeal merely confirms that the employee is properly classified in the position and grade that they agreed to perform when they were hired.

Nunnally is further distinguishable because it involved the interpretation of a particular statutory term—"performance of duty"—rather than evaluation of whether a particular grade properly describes an employee's position. *See Nunnally*, 80 A.3d at 1010. As discussed *infra* pp. 26-34, application of the nine FES factors requires evaluating different standards and benchmarks, sometimes to determine inherently subjective qualities like the level of independence that the employee exercises in the role. Those sorts of questions are not readily amenable to judicial review in the first place because they ultimately afford a wide degree of discretion to DCHR's classification experts. *See Sierra Club*, 670 A.2d at 358; *Cook v. Food & Drug Admin.*, 733 F.3d 1, 6 (D.C. Cir. 2013).

C. The Court should defer to DCHR's regulations reasonably interpreting the Omnibus Act.

Although the text and history of the CMPA rebuts the presumption of judicial review, DCHR's regulations lend further support to that conclusion. It is well established that this Court "defer[s] to the agency's interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is

unreasonable or is inconsistent with the statutory language or purpose." *D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012); *Brown v. Watts*, 993 A.2d 529, 533 (D.C. 2010) ("[T]his [C]ourt and the Superior Court generally defer to an agency's interpretation of its own statute." (cleaned up)). "This deference stems from the agency's presumed expertise in construing the statute it administers." *D.C. Dep't of Env't v. E. Capitol Exxon*, 64 A.3d 878, 881 (D.C. 2013) (cleaned up).[2]

DCHR's current regulations plainly foreclose McFarland's suit. In line with the analysis above, those regulations state that "[e]xcept when a classification decision results in a reduction in grade, the Director's decision on a classification appeal shall be final and not subject to further administrative or judicial review." 6B DCMR § 1110.5. This rule was adopted in 2022 as a direct result of the Omnibus

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[2] Although the issue of the Superior Court's subject-matter jurisdiction is usually "a legal issue of the sort that judges, not administrators, decide," *U.S. Parole Comm'n v. Noble*, 693 A.2d 1084, 1098 (D.C. 1997), in this instance deference is appropriate. *Cf. Frazier v. D.C. Dep't of Emp. Servs.*, 229 A.3d 131, 138-39 (D.C. 2020) (deferring to agency's regulation providing that certain determinations could be appealed only to the Chief Risk Officer). The Omnibus Act's amendments to the CMPA's appeal structure for classification decisions constituted "changes to the substantive law" governing personnel matters. *Coleman*, 80 A.3d at 1036 n.9. Those changes (and the CMPA more broadly) are "designed to generally channel review of government employment decisions through an expert administrative agency." *Id.* at 1034. And DCHR is the expert agency tasked with deciding classification appeals and issuing regulations to carry out the related statutory provisions. *See* D.C. Code §§ 1-604.04(a), 1-608.01(a).

Act, which DCHR interpreted as "remov[ing] classification appeals from OEA's jurisdiction." 69 D.C. Reg. at 10,388. DCHR explained that, following the Omnibus Act, "the CMPA no longer authorizes employees to appeal classification decisions to the Superior Court." *Id.* Thus, as made clear through DCHR rulemaking, the Director's classification decisions are "final" and "without specific authorization for judicial review." *Id.*[3]

For all of the reasons just discussed, DCHR's reasonable interpretation of the Omnibus Act is "not plainly wrong or inconsistent with its legislative purpose," and therefore merits deference. *Hotel Tabard Inn v. D.C. Dep't of Consumer & Regul. Affs.*, 747 A.2d 1168, 1174 (D.C. 2000) (cleaned up). The text of the CMPA, as amended by the Omnibus Act, limits administrative and judicial review to major adverse actions, and the Council deliberately deleted classification appeals from the list of actions subject to further review. All signs indicate this was an intentional decision to streamline the treatment of minor grievances like classification appeals toward experienced experts, consistent with the CMPA's overarching goals.

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[3] DCHR adopted its current regulations after McFarland filed his petition for review in Superior Court in 2019. But the Superior Court's subject-matter jurisdiction is governed by statute, not regulation, and the Omnibus Act was enacted in 1998. DCHR is not bound to apply its earlier regulations that incorrectly interpreted the statute. *See Seman v. D.C. Rental Hous. Comm'n*, 552 A.2d 863, 866 (D.C. 1989) ("[A]n agency adjudication cannot stand if the proceedings on which it is based violates a statute even though justified by rules or regulation the agency itself has published.").

Because "classification decisions are informed by employees, supervisors, and classification specialists, guided by published classification standards, the regulatory review process sufficiently ensures proper position classification." 69 D.C. Reg. at 10,388. The DCHR classification appeal process also affords the employee an opportunity to be heard by decisionmakers outside of his chain of command, since the desk audit is conducted by a specialist at DCHR rather than anyone at the employing agency—making the process fair as well as streamlined.

Admittedly, DCHR's 2022 regulations could be seen as a change in how the agency approaches classification appeals. *Cf. James Parreco & Son v. D.C. Rental Hous. Comm'n*, 567 A.2d 43, 48 (D.C. 1989) (noting that deference "is at its zenith where the administrative construction has been consistent and of long standing"). DCHR initially reacted to the Omnibus Act by amending its regulations to remove the ability to appeal classification matters to the OEA, but in doing so retained a reference to seeking Superior Court review. *See* 47 D.C. Reg. at 2422. But "an agency is not precluded from changing its interpretation of a statute if it believes that a different interpretation is more consistent with the statutory language and legislative intent and if it provides an explanation of the change." *Frazier*, 229 A.3d at 139 (cleaned up). If adequately explained, even an agency's amended understanding of a statute is entitled to deference. *Id.*

DCHR's amendment to its regulations is reasonable and properly explained. The change was triggered after the agency subsequently undertook a thorough review of the Omnibus Act and its changes to the CMPA. *See* 69 D.C. Reg. at 10,388 (explaining basis for change and noting that no comments were received from the public on the proposed rulemaking). As the Council itself acknowledged, classification appeals are rare, Report on Bill 12-44, at 16, so there was not an acute need to revise the regulations governing classification appeals. But in light of the statutory changes and this Court's decisions in *Coleman* and *Nunnally*, the agency has revised its position to reflect the most faithful interpretation of the statute. The Court should uphold that determination and conclude that classification appeals are not judicially reviewable.[4]

[4] In the more than two decades between the enactment of the Omnibus Act in 1998 and the amendment of DCHR's regulations in 2022, it does not appear that this Court ever issued a published decision in a classification appeal. The District is aware of one case that was decided after the adoption of 2022 regulations, and that was an unpublished memorandum opinion and judgment, *see Butler-Truesdale v. D.C. Dep't of Hum. Res.*, No. 20-CV-581 (D.C. Aug. 3, 2023). That case was briefed and argued before the change in regulations, and the issue of jurisdiction was neither raised by the parties nor addressed by the Court. Thus, even if the decision had been published, it would not "constitute precedent[]" on the jurisdictional question. *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994).

II. Alternatively, The Classification Ruling Should Be Affirmed.

A. DCHR's 2019 decision was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion.

If the Court determines that classification appeals are judicially reviewable and reaches the merits, it should affirm. An agency's factual findings and legal conclusions "must be affirmed if they are supported by substantial evidence," *District of Columbia v. D.C. Dep't of Emp. Servs.*, 734 A.2d 1112, 1115 (D.C. 1999) (quoting *Franklin v. D.C. Dep't of Emp. Servs.*, 709 A.2d 1175, 1176 (D.C. 1998)), and are not arbitrary, capricious or an abuse of discretion, *Wash. Canoe Club v. D.C. Zoning Comm'n*, 889 A.2d 995, 998 (D.C. 2005). Substantial evidence is "more than a mere scintilla"; it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Combs v. D.C. Dep't of Emp. Servs.*, 983 A.2d 1004, 1009 (D.C. 2009).

DCHR's November 2019 decision was legally sound and supported by substantial evidence. In that review, DCHR complied with the Superior Court's order to re-review McFarland's case in light of the additional materials in the record. Add. 16a. A new classification specialist not previously involved in McFarland's case analyzed both the materials prepared by Delate in 2011 and the review completed in 2013 and 2014 to determine whether they complied with proper classification standards. JA 15-20. The new reviewer concluded that Delate had not followed proper standards because he had not used standard grading criteria; he had

merely compared the descriptions between Grade 9 and Grade 11 and declared that McFarland's position fit into Grade 11. JA 19-20. The desk audit completed in 2013 and the classification appeal decision completed in 2014, on the other hand, used OPM's standard methodology for establishing a position's grade: assigning points across the nine FES categories and translating them to the appropriate grade. JA 20.

Substantial evidence supports the reasonable conclusion that the FES factors are a proper methodology for determining a position's grade. OPM, which created the classification system used by the District, *see* D.C. Code § 1-611.01(c); 6B DCMR § 1102.1, publishes guidance on how to establish the proper grade for a position. *See* OPM, *The Classifier's Handbook* (1991), https://tinyurl.com/2wkupz5y. The November 2019 decision correctly applies that guidance: a reviewer should "determine the grade level by assigning a factor level and the corresponding number of points to each of the nine factors in the position description." *Id.* at 9; *see* JA 18. The official review conducted in 2013 and 2014 engaged in that exercise and assigned points to each of the factors to determine the appropriate grade level for McFarland's position. JA 32-33. It utilized OPM's guidance for establishing the points for each factor and converting those to a grade level. *See* OPM, *Administrative Analysis Grade Evaluation Guide* (1990), https://tinyurl.com/2492k7wj. In contrast, Delate's 2011 review discussed the FES

factors but did not assign them points to calculate the proper grade level. JA 25-28. It was not arbitrary, capricious, or an abuse of discretion for DCHR to credit the review that followed OPM's standards rather than the one that did not.

Both the Superior Court and this Court have already held that DCHR's 2013-2014 review finding that McFarland was properly classified as a Grade 9 was supported by substantial evidence. Add. 1a-2a. There is no evidence (or claim) that McFarland's job responsibilities have changed since those decisions. The only change is the discovery of the 2011 Delate materials, which had not been part of the agency record in the original appeal. Those materials do not undermine the substantial evidence supporting the Grade 9 finding because they used improper methods that did not comport with OPM's published standards. And even Delate's memorandum was tentative in its conclusions, acknowledging that Grade 9 might be the proper classification for McFarland's position if his supervisors strengthened their oversight of his work. JA 22. DCHR did not abuse its discretion in declining to reconsider its Grade 9 determination—which was based on the correct methodology and had already been upheld by two courts—rather than adopt Delate's flawed analysis.

B. McFarland's arguments to the contrary lack merit.

McFarland makes three arguments in support of reversal, but none is persuasive.

First, McFarland argues that there is "no evidence" that Delate's review in 2011 failed to comply with proper classification standards or the FES point system. Br. 15-17. But even a cursory review of the materials shows that Delate did not assign points to the FES categories to establish the proper grade level for McFarland's position. JA 21-28. Instead, he compared the Grade 9 and Grade 11 descriptions and concluded that the "predominate difference between the two is that the grade nine is less independent." JA 22. He then concluded, based on his interviews, that McFarland was operating mostly independently, even though McFarland's supervisors reported that, in fact, McFarland was simply failing to keep management properly informed of his work. JA 22. Delate dismissed this as a performance issue but ultimately concluded that McFarland could properly be classified as Grade 9 if his managers supervised his work more closely. JA 22.

Delate's analysis does not align with OPM's guidance on how to properly determine a position's grade. That guidance (published in the 1990s, well before Delate conducted his review) gives step-by-step instructions to classification specialists on how to conduct the inquiry. *See* OPM, *The Classifier's Handbook* 9-12 (1991). Contrary to Delate's conclusion, there are substantial differences between the typical Grade 9 and Grade 11 positions across multiple FES factors, not just the level of independence. *See* OPM, *Administrative Analysis Grade Evaluation Guide* 5 (1990) (showing typical FES factor levels for different grades). It should

therefore come as little surprise that DCHR never adopted Delate's analysis as its final decision and instead assigned another specialist to complete the desk audit after Delate left the agency.

Second, McFarland argues that DCHR should not have been permitted to rely on its 2014 analysis when it conducted its review in 2019. Br. 16-17. But the Superior Court's remand required DCHR to reconsider its classification decision in light of the materials available to the agency. Add. 15a-16a. It would have been improper for the agency to ignore the desk audit it conducted in 2013 and the appeal it reviewed in 2014, which formed the agency's final decision on McFarland's classification. At the very least, the agency's own prior analysis of the very same classification question was relevant and instructive. And because the 2014 analysis undoubtedly was considered as part of the 2019 determination, it is properly part of the record on review in *this* proceeding.[5]

Third, McFarland argues that the Superior Court should have sanctioned DCHR for making false representations in prior cases. Br. 18-19. On appeal, he

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[5] McFarland also briefly suggests (but does not develop an argument) that DCHR erred in comparing the Delate materials to the 2013-2014 review rather than conduct a wholesale reexamination of his job classification. *See* Br. 12. Any argument on this point is forfeited because McFarland failed to develop it, either before the Superior Court or this Court. *See Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008). Regardless, because the 2013-2014 review was supported by substantial evidence (as this Court has already held), DCHR did not act arbitrarily or capriciously in adhering to that earlier determination.

suggests that sanctions were authorized by Super. Ct. Civ. R. 11, although he did not cite Rule 11 (or, for that matter, any other legal authority) in his request for sanctions below. *See* JA 54-55. He therefore forfeited his request for Rule 11 sanctions, and he offers no reason to excuse that forfeiture. *See Pourbabai v. Bednarek*, 250 A.3d 1090, 1096 (D.C. 2021). In any event, the trial court has "broad discretion" to determine whether Rule 11 has been violated, and McFarland cannot establish an abuse of that discretion. *Kleiman v. Kleiman*, 633 A.2d 1378, 1383 (D.C. 1993).

The Superior Court did not abuse its discretion in denying McFarland's cursory request for sanctions. McFarland's request (1) never cited Rule 11 or other legal authority, (2) did not "describe the specific conduct that allegedly violates Rule 11(b)," such as a particular pleading or motion in the current proceeding that lacked evidentiary support, (3) did not comply with Rule 11's procedural requirements, such as a separate motion and opportunity to withdraw, and (4) did not request any particular sanction for the alleged violation. *See* Super. Ct. Civ. R. 11(c)(2). On appeal, McFarland does not identify any legal error infecting the Superior Court's analysis of the sanctions issue. The Superior Court accurately noted that McFarland had not requested a specific sanction and then exercised its discretion not to impose any sanctions at all. JA 72. McFarland offers no authority suggesting that the Superior Court was *required* to sanction the District under these circumstances, and

he otherwise fails to identify an abuse of discretion, especially given that any request for Rule 11 sanctions was plainly deficient on its face.

The trial court also did not abuse its discretion for failing to impose sanctions pursuant to its inherent authority. Again, McFarland did not expressly invoke the court's inherent authority below; he cited no authority at all in his request for sanctions. JA 54-55. He also does not rely on the court's inherent authority on appeal. Br. 18-19. The issue is therefore doubly forfeited. *See McFarland v. George Wash. Univ.*, 935 A.2d 337, 351 (D.C. 2007).

Even if the issue had been properly raised, trial courts "enjoy considerable latitude in deciding the type of sanctions to impose under their inherent powers." *In re S.U.*, 292 A.3d 263, 269 (D.C. 2023) (cleaned up); *Mills v. District of Columbia*, 259 A.3d 750, 762 (D.C. 2021) ("[T]he decision whether to impose sanctions is committed to the discretion of the trial court." (cleaned up)). Neither on appeal nor below has McFarland identified any particular statements that he contends were false or that lacked evidentiary support at the time they were made. Rather, he more generally asserts that the District "made multiple false statements" in prior proceedings giving the impression that Delate's 2011 analysis was never completed. Br. 19. But it reasonably appears from the record that Delate's analysis *was not* completed. Although McFarland obtained a memorandum indicating that Delate had completed his desk audit review, that memorandum was never transmitted to

McFarland in 2011, Br. 7, nor was it apparently adopted as DCHR's classification review decision. *See* JA 21-22; *supra* pp. 10-11; Add. 3a-8a. Although the record is not entirely clear, it appears that Delate's memorandum was a purely predecisional analysis that the agency never adopted. *See supra* pp.10-11; Add. 6a-8a (explaining that the Delate materials did not comply with DCHR's standard practices for classification review decisions or classification appeal decisions). Accordingly, the trial court did not abuse its discretion in declining to impose sanctions.

CONCLUSION

The Court should vacate and remand with instructions to dismiss for lack of jurisdiction. Alternatively, the Court should affirm the decision below on the merits.

Respectfully submitted,

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May 2024

ADDENDUM

District of Columbia
Court of Appeals

No. 16-CV-399

JOHN T. MCFARLAND,
Petitioner,
v. **2014 CAP 5775**

DISTRICT OF COLUMBIA
DEPARTMENT OF HUMAN RESOURCES ,
Respondent.

BEFORE: Fisher and Blackburne-Rigsby, Associate Judges, and Farrell, Senior Judge.

J U D G M E N T

On consideration of respondent's motion for summary affirmance, petititioner's motion for an extension of time to file his lodged opposition, and the record on appeal, it is

ORDERED that petitioner's motion for an extension of time is granted and the lodged opposition is filed. It is

FURTHER ORDERED that respondent's motion for summary affirmance is granted. *See Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979). Petitioner's declaration and exhibits were properly struck from his brief in support of his petition for review of respondent's classification decision because they were not included in the agency record. *See Mack v. D.C. Dep't of Employment Servs.*, 651 A.2d 804, 806 (D.C. 1994) (noting that when reviewing the final decision of an agency, the court "cannot consider issues or evidence not presented to the agency"); *see also* Super. Ct. R. Civ. P. Agency Review Rule 1(g) (requiring that the court "base its decision exclusively upon the agency record"). Further, the Superior Court did not err in denying petitioner's petition for review because there is substantial evidence in the record to support respondent's decision. *See Cohen v. Rental Hous. Comm'n*, 496 A.2d 603, 605 (D.C. 1985) ("In reviewing a decision of an administrative agency, this court must determine whether there is substantial evidence in the record to support the decision, or whether it is in any way arbitrary, capricious, or an abuse of discretion."); *see also*

No. 16-CV-399

D.C. Code § 2-510 (2016 Repl.). Petitioner failed to demonstrate that there existed a relevant signed Classification Desk Audit Decision that was not included in the agency record. *See Plummer v. D.C. Bd. of Funeral Directors*, 730 A.2d 159, 163 (D.C. 1999) (observing that the party asserting the agency's error "bears the burden of demonstrating error").

FURTHER ORDERED and ADJUDGED that the order on appeal is hereby affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copy to:

Honorable Brian F. Holeman

QRB, Civil Division

Louise E. Ryder, Esquire
David A. Branch, Esquire
Law Office of David A. Branch & Associates PLLC
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Todd S. Kim, Esquire
Solicitor General – DC

cml

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JOHN T. MCFARLAND Petitioner, v. DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN RESOURCES and DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Respondents.	)	2017 CA 007722 P(MPA) HON. ROBERT R. RIGSBY

DECLARATION OF LORRAINE GREEN

I, LORRAINE GREEN, affirm as follows:

1. I am a Supervisory Human Resources Specialist with the Classification Unit for the District of Columbia Department of Human Resources (DCHR). In this role, I provide leadership, administrative oversight, and supervision over classification activities at DCHR.
2. The Classification Unit was asked to conduct an analysis of a purported 2011 position classification review prepared by Peter Delate,[1] as requested by John McFarland of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), and a 2013 position classification review prepared by Lewis Norman.[2] This request was made to determine whether there were any deficiencies with the 2011 position review documents that

[1] Attached as Exhibit 1.
[2] Attached as Exhibit 2.

could have prompted additional review by the Classification Unit in 2013 to ensure that Mr. McFarland's position was properly classified in accordance with applicable standards for position classification reviews.

3. I conducted this analysis in my role as a Supervisory Human Resources Specialist for the Classification Unit and make the following statements regarding these documents.

4. Based on my review of these documents, the following is a chronology of events related to Mr. McFarland's request for a classification review of his position as a Program Support Specialist:

   - January 7, 2011: John McFarland submits a request for classification review. The request is assigned to Mr. Delate, a Human Resources Specialist at DCHR.
   - March 30, 2011: Date of Mr. Delate's Memorandum indicating that he completed the evaluation of Mr. McFarland's position.[3]
   - April 11, 2011: In an email to Mr. Delate, Mr. McFarland inquires about the status of the review.[4] Mr. Delate responds that the evaluation has been completed but his supervisor has requested that it be revised.
   - May 3, 2011: Date of Mr. Delate's purported Classification Appeal Decision, indicating that Mr. McFarland was working within the Grade 11 scope of the Program Support Specialist role.[5]
   - October 25, 2011: Mr. Delate separates from DCHR.

[3] Attached as Exhibit 1.
[4] Attached as Exhibit 3 ("... my supervisor asked that it be written in a different/longer format and presented to her..."). This e-mail is included on page 20 of the record filed with this tribunal in this matter. However, the e-mail is difficult to read due to its print quality.
[5] Attached as Exhibit 4.

- October 28, 2013: Date of Position Classification Review Decision completed by Lewis Norman, Lead Human Resources Specialist with DCHR, indicating that Mr. Delate left DCHR before completing the evaluation process and determining that Mr. McFarland was appropriately classified at the Grade 9 level.
- June 17, 2014: Mr. McFarland submits an appeal of the 2013 decision prepared by Mr. Norman.
- July 16, 2014: Date of the Position Classification Appeal Decision[6] sustaining the 2013 determination that Mr. McFarland was properly classified at the Grade 9 level.

5. The Classification Unit is responsible for classifying positions in accordance with Chapter 11 of the D.C. Personnel Manual (Title 6-B of the D.C. Municipal Regulations)[7] and in accordance with the guidelines and standards established by the U.S. Office of Personnel Management (OPM).[8]
6. The first step in the process is to communicate with the employee and the supervisor to determine what duties and responsibilities the employee is actively fulfilling and whether those duties and responsibilities are consistent with the employee's current position description. If the employee's identified duties and responsibilities are inconsistent with the current position description, the description may be amended so that it reflects the actual job duties of the employee. Alternatively, the agency could manage the employee to adhere to the duties described in the current position description. The resulting position description must be approved by the supervisor.

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[6] Attached as Exhibit 5 and can be found at pages 81-90 of the record.
[7] Attached as Exhibit 6; *see, e.g.*, Sec. 1106.3 ("The DC Office of Personnel shall also provide that all positions are properly evaluated by application of official classification standards, in accordance with accepted classification principles and techniques and in accordance with applicable rules and regulations.").
[8] Please refer to www.OPM.gov. for applicable classification standards, which include the Classifier's Handbook, attached as Exhibit 7.

7. The Factor Evaluation System (FES) analysis is then applied to the verified position description to determine the appropriate grade level.

8. As described in the Classifier's Handbook at 9,[9] the basic steps to evaluate a position under the FES are to:

    a. Prepare a verified position description in the FES format;

    b. Select the appropriate FES standard and grade level criteria;

    c. Determine the grade level by assigning a factor level and the corresponding number of points to each of the nine factors in the position description;

    d. Convert the total point value of all factors to a grade using the FES point conversion chart; and,

    e. Record the results of the evaluation.

9. Our analysis indicates that Mr. Delate did not follow the classification guidelines to properly determine the appropriate grade level for Mr. McFarland's position:

    * Mr. Delate's March 2011 Memorandum states that he consulted both Mr. McFarland and Mr. McFarland's supervisor, Clifford Cooks, regarding Mr. McFarland's position. However, there is no evidence that Mr. Delate compared the information that he received against Mr. McFarland's position description to determine whether the position description required amendment.

    * Mr. Delate therefore had no verified position description to compare against the FES factors to determine the appropriate grade level of the position.

    * Mr. Delate's primary method of evaluating Mr. McFarland's position, and the basis for his determination that the position should have been a Grade 11, was a comparison of two

[9] Attached as Exhibit 7.

position descriptions (Grade 9 and Grade 11) and the language used in those descriptions.[10] Comparing certain duties against two position descriptions is not the proper method of conducting a position classification review.

- The May 3, 2011, Classification Appeal Decision does not comport with the Classification Unit's practice that the appeal determinations are reviewed by a higher authority; by signing twice, Mr. Delate attempted to "approve" his own report.
- Neither the March 30, 2011, Memorandum nor the May 3, 2011, Classification Appeal Decision completed by Mr. Delate applies the classification standards to determine the appropriate grade level. Mr. Delate did not assign points for each factor, total the score, and convert that score to a grade level.

10. Our analysis indicates that the 2013 Position Classification Review Decision and the subsequent 2014 Position Classification Appeal Decision do follow the classification guidelines and properly determine the appropriate grade level for Mr. McFarland's position:
    - Mr. Norman based his analysis on information provided by Mr. McFarland's supervisors about his duties, and on Mr. McFarland's position description, which was certified as accurate on October 18, 2013. Mr. Norman notes that Mr. McFarland failed to attend scheduled meetings with his supervisors and DCHR and that the supervisors disagreed with Mr. McFarland's contentions about the work that he was performing.
    - Mr. Norman noted his use of the Administrative Analysis Grade Evaluation Guide and properly applied the FES by analyzing and scoring the nine (9) factors, calculating the

[10] *See* March 30, 2011, Memorandum, attached as Exhibit 1, at 1 ("In my audit I review the position descriptions for both the Program Support Specialist at the grade 9 (Mr. McFarland's present description) and the grade 11…"); *see also* at 2 ("A comparison of the language indicates that the predominate difference between the two is that the grade 9 is less independent…"). In the "Classification Appeal Decision," Mr. Delate again references the two position descriptions: he states that a subject's position is "reviewed against the CS-0301 series and the two descriptions of the career ladder." *See* May 3, 2011, Classification Appeal Decision, attached as Exhibit 4, at 1.

total points, and converting those points to a grade in accordance with classification standards.

- The July 16, 2014, Position Classification Appeal Decision was approved by Karla Kirby, the Associate Director for Recruitment and Classification, and by Shawn Stokes, DCHR Director.

11. In summary, the concern that Mr. Delate's 2011 determination did not comport with proper classification practices could have prompted additional review of Mr. McFarland's position in 2013.

Lorraine Green
Supervisory Human Resources Specialist
Classification Unit
D.C. Department of Human Resources

12/20/18
Date

Exhibit 3

SC1

From: McFarland, John (DCRA)
Sent: Monday, April 11, 2011 10:43 AM
To: Delate, Peter (DCHR)
Subject: from John McFarland, regarding my desk audit request

Good morning Peter,

Do you have an update you can give me regarding my desk audit request and our March 21, 2011 meeting?

John McFarland

-----Original Message-----
From: "McFarland, John (DCRA)" <john.mcfarland@dc.gov>
To: "xDelate, Peter (DCHR)" <xpeter.delate@dc.gov>
Date: Wed, 20 Apr 2011 08:46:07 -0400
Subject: from John McFarland, regarding my desk audit request
Good morning Peter,

I believe I mentioned this to you, during are meeting in my office, but just in case I did not, I want you know that as of Jan-Feb 2011 I am the liaison for the Board of Funeral Directors as well, handling that Board's business administration responsibilities. Please take this into account.

Thank you and have a good day.

John McFarland

From: McFarland, John (DCRA)
Sent: Tuesday, April 12, 2011 9:07 AM
To: Delate, Peter (DCHR)
Subject: RE: from John McFarland, regarding my desk audit request

Peter,

Thanks. No need to apologize, I just wanted an update. Based on your comments, I suspect I will receive your response within the next two weeks.

Am I correct?

John McFarland

From: Delate, Peter (DCHR)
Sent: Monday, April 11, 2011 4:53 PM
To: McFarland, John (DCRA)
Subject: RE: from John McFarland, regarding my desk audit request

Hi John.

Sorry for the delay. I had completed my work and wrote it up, however, my supervisor asked that it be written in a different/longer format and presented to her prior to being sent to DCRA.

It is done and Ms Moone should have it back to me and then me to DCRA/you shortly.

Again, my apologies for the delay.

Pete Delate

Peter B. Delate, SPHR
Human Resources Specialist
Compensation and Classification Administration
DC Department of Human Resources
441 4th Street, NW, Suite 320S
Washington, DC 20001
202-727-0033- phone
202-727-4977 - fax
email - peter.delate@dc.gov

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

JOHN MCFARLAND,

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Respondents.

Case No. 2017 CA 007722 P(MPA)
Judge Robert R. Rigsby

ORDER

This matter is before the Court on two motions: (1) Petitioner's Motion for Sanctions and to Strike Respondents' Declaration of Lorraine Green and Attachments to the Declaration ("Petitioner's Motion for Sanctions"), filed on May 15, 2019; and (2) Respondents' Motion to Stay Briefing Schedule Pending Ruling on Petitioner's Motion to Strike, filed on August 19, 2019. On May 30, 2019, Respondents' filed their Opposition to Petitioner's Motion for Sanctions. Upon consideration of the entire record herein, the Court **VACATES** the Agency's decision and **REMANDS** the case to the Agency for further proceedings. As the underlying case is being remanded, this Court **DENIES AS MOOT** both Petitioner's Motion for Sanctions and Respondents' Motion to Stay Briefing Schedule.

BACKGROUND

Petitioner is employed by the District of Columbia Department of Consumer and Regulatory Affairs ("DCHA") as a Program Support Specialist, CS-0301-09. Resp'ts' Opp'n to Pet'r's Mot. for Sanctions at 1. In early 2011, Petitioner requested a position classification review of his position. *Id.* The request was originally assigned to Mr. Peter B. Delate, a District

of Columbia Department of Human Resources ("DCHR") Human Resource Specialist. October 16, 2017 DCHR Classification Appeal at 1. At some point after Mr. Delate's initial assignment, another Human Resource Specialist (Mr. Lewis Norman) was assigned to review Petitioner's request. *Id.* Mr. Lewis Norman completed a desk audit, and on October 28, 2013, DCHR issued a Classification Desk Audit Decision determining that Petitioner's position was correctly classified as a Grade 9. Resp'ts' Opp'n to Pet'r's Mot. for Sanctions at 1-2.

Petitioner filed a Classification Appeal on June 17, 2014. *Id.* at 2. On July 16, 2014, DCHR issued a Classification Appeal Decision affirming the October 28, 2013 findings. *Id.* On September 15, 2014, Petitioner filed a Petition for Review in the Superior Court of the District of Columbia. October 16, 2017 DCHR Classification Appeal at 1. On March 24, 2016, the Superior Court of the District of Columbia affirmed DCHR's determination based on the Record certified to the Court. *Id.* Petitioner appealed the decision to the District of Columbia Court of Appeals, who issued a Judgment on February 16, 2017, affirming DHCR's decision. *Id.*

In an August 28, 2017 letter to DCHR, Petitioner requested that DCHR reconsider its decision. *Id.* After reviewing "[Petitioner's] request, [Petitioner's] District of Columbia (D.C.) Superior Court and the D.C. Court of Appeals cases, and responsive documents to [Petitioner's] Freedom of Information Act (FOIA) requests," DCHR determined it did not have "sufficient reason to reconsider its decision." *Id.* In response, Petitioner filed a Petition for Review of Agency Decision in this Court on November 16, 2017.

DISCUSSION

A central contention in the instant case is that the record certified to this Court by DCHR on February 22, 2018 is incomplete. Whether the record is complete is of particular importance because this Court must "base its decision exclusively upon the administrative record and shall

not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." D.C. Sup. Ct. Civ. P., Agency Review R. 1(g). Although the burden is placed on the Agency to "prepare and transmit the record to the court, the ultimate burden of persuasion is on the party challenging the agency's decision, so that it is up to that party to ensure that any gaps in the record are filled." *Hoage v. Board of Trustees of the Univ. of the District of Columbia*, 714 A.2d 776, 781 (D.C. 1998). Effectively, the burden lies on the petitioner to present evidence which sufficiently shows that an error occurred in the preparation or transmission of the record. *See id; see also Plummer v. D.C. Bd. of Funeral Directors*, 730 A.2d 159, 163 (D.C. 1999).

Petitioner has consistently claimed over the pendency of his dispute with the Agency that the Record relied upon by the Agency is materially deficient. Petitioner asserted during his appeals of the initial decision made by the Agency that the HR Specialist originally assigned to his position classification review, Mr. Delate, completed the review and issued a decision prior to the reassignment of the review to Mr. Norman. Respondents have consistently represented, both in the previous appeals and in their most recent refusal to reconsider, that although "Mr. Delate was working on Petitioner's position classification review at the time that he left DCHR, a desk audit is not *complete* unless the auditor issues a classification decision. In this case, such a decision was not issued by Mr. Delate before he left DCHR." Resp't's Mot. to Strike Pet'r's Submissions and Supporting Memorandum of Points and Authorities at 3; *see also* October 16, 2017 DCHR Classification Appeal at 1 ("Mr. Peter Delate, a DCHR Human Resources (HR) Specialist, initially was assigned to conduct your desk audit; however, Mr. Delate's employment with DCHR ended. As a result, Mr. Lewis Norman, a DCHR Supervisory HR Specialist, completed your desk audit.").

Based on these representations, the evidence in the record provided by the Agency, and the lack of evidence of a desk audit completed by Mr. Delate, the District of Columbia Court of Appeals affirmed the Agency's original decision. *McFarland v. District of Columbia Department of Human Resources*, No. 16-CV-399 (D.C. 2017) ("Petitioner failed to demonstrate that there existed a relevant signed Classification Desk Audit Decision that was not included in the agency record.").

However, subsequent to the District of Columbia Court of Appeals Judgment, "a Classification Appeal Decision prepared and signed by Mr. Delate on May 3, 2011 was discovered through Petitioner's Freedom of Information Act (FOIA) request." Resp'ts' Opp'n to Pet'r's Mot. for Sanctions at 2. Despite this discovery occurring prior to its issuance, DHCR's most recent Classification Appeal Decision still represented that Mr. Lewis Norman completed Petitioner's desk audit after Mr. Delate left DCHR. October 16, 2017 DCHR Classification Appeal at 1. Further, although Petitioner's FOIA request was included in the Agency Record certified to this Court on February 22, 2018, the responsive documents to the FOIA, including the May 2011 Classification Appeal Decision, were not included in the Agency Record.

At this Court's request, Respondents attempted to reconcile the existence of the May 2011 Classification Appeal Decision with its continued absence from the certified Agency Record. On December 21, 2018, Respondents submitted the Declaration of Lorraine Green. At no point in the Declaration did Lorraine Green cite to any regulations or statutes which would explain why the May 2011 Classification Appeal Decision did not need to be included in the certified Agency Record. Rather, in the Declaration, Lorraine Green merely summarized that "Mr. Delate's 2011 determination did not comport with proper classification practices and that this concern could have prompted additional review of [Petitioner's] position in 2013."

Declaration of Lorraine Green at 6. Although Lorraine Green and Respondents advance several arguments as to the invalidity of the May 2011 Classification Appeal Decision, the weight that should be assigned to the decision does not have any bearing on whether it should be included in the Agency Record. Moreover, while Respondents argue that the May 2011 Classification Appeal Decision was erroneous in its findings, they have not provided any explanation that would support its absence from the Agency Record.

Therefore, this Court finds that the exclusion of the May 2011 Classification Appeal Decision was clearly erroneous. As the Agency's decision in the instant case was dependent upon an erroneous Agency Record, the decision in this case is **VACATED** and the matter is **REMANDED** to the Agency for further proceedings.

Accordingly, and based on the entire record herein, it is this the 17th day of September, 2019, hereby

ORDERED that the October 16, 2017 decision by DCHR is **VACATED**; it is further

ORDERED that this case is **REMANDED** to DCHR for further proceedings; it is further

ORDERED that Petitioner's Motion for Sanctions is **DENIED AS MOOT**; it is further

ORDERED that Respondents' Motion to Stay Briefings is **DENIED AS MOOT**.

SO ORDERED.

Robert R. Rigsby

Robert R. Rigsby, Associate Judge
Superior Court of the District of Columbia

Copies to Counsel of Record via CaseFileXpress.

CERTIFICATE OF SERVICE

I certify that on May 31, 2024, this brief was served through this Court's electronic filing system to:

David A. Branch
Counsel for Appellant

/s/ Jeremy R. Girton
JEREMY R. GIRTON